appropriate in light of the purported purpose of Section 617(a). Indeed, if the Commission takes neither approach, virtually any U.S. company could shield itself from being acquired by engaging in a cable system acquisition an divestiture program that would assure it was subject to, but could never satisfy, the three year holding requirement by owning at least one and no more than two cable systems.

4. Multiple step transfers.

Section 617(b) permits one or more transfers of one or more systems in a group by a buyer subsequent to that buyer's acquisition of such group if such subsequent transfer(s) were required by the terms of that buyer's initial acquisition of such group. Time Warner encourages the Commission to recognize the full scope of this provision. Specifically, the Commission should recognize that neither the express language in the statute nor any legislative history regarding Section 617(b) restricts this exclusion to any particular or limited facts or circumstances.

Any transaction that is a necessary consequence of such initial transaction for any legitimate reason that was in existence at the time of such initial transaction or an intentional next step should be considered part of the initial sale. Specifically, the "terms of the sale" should include but not be limited to an express statement in the initial sale agreement. If express language in the initial sale agreement states the parties' understanding relating to one or more subsequent transfers, the reason for such requirement should be irrelevant. In the absence of any such language, if there is any legal requirement or necessity as of the time of the initial sale that would compel the buyer in the initial sale transaction to resell one or more systems it acquired in the initial sale, then any resale consistent with such requirement or necessity also should be considered part of the initial sale.[30] Finally, the Commission should establish policies noting that Section 617(b) does not require that the "terms of the [initial] sale" that "require" the subsequent transfer(s) specify the number or identity of either the "one or more such systems" the buyer will "subsequently transfer" or the "one or more third parties" that are the transferee(s).

The following types of business arrangements that technically involve a series of distinct transactions, but are in fact a series of steps necessary to achieve the principle transaction desired, should also be considered one transaction pursuant to Section 617(b).

(1) Three-way trades, such as when party A wishes to acquire a system owned by party B and party C wishes to acquire a system owned by party A. Party A can defer income taxes on the disposition of its system by having party C acquire party B's system, then trading party A's system for party B's system.

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[30]This interpretation is consistent with both a literal reading of the statute and the "operation of any law" exception in Section 617(c)(2). <u>See</u> discussion at Section I.E.1(b), <u>infra</u>, regarding the "operation of any law" exception in Section 617(c)(2) for an indication of the possible scope of a legal requirement or necessity for a resale under Section 617(b).

(2) If a party acquires additional interests in a system to accommodate a sale or other disposition of that system, such as when a company owns an interest in a system (e.g., a managing general partner's interest). In order to complete a sale, the company must have total ownership and, accordingly, acquires the other interests (e.g., the limited partner's interests), then sells (or trades) the system to a third party.[31]

E. Exceptions

1. The three exceptions set forth in Section 617(c) should be read expansively.

Section 617(c) provides that the three year holding requirement in Section 617(a) shall not apply to:

(1) any transfer of ownership interest in any cable system which is not subject to Federal income tax liability;

(2) any sale required by operation of any law or any act of any Federal agency, any State or political subdivision thereof, or any franchising authority; or

(3) any sale, assignment, or transfer to one or more purchasers, assignees, or transferees controlled by, controlling, or under common control with, the seller, assignor or transferor.

(a) Exception for "Tax Free" Transfers.

Time Warner concurs with the Commission's belief that the following transactions properly fall within the exception concerning "tax free" transfers in Section 617(c)(1) because such "transactions are not subject to current tax liability and are consistent with the objectives of the anti-trafficking provision":[32]

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[31]The Commission's adoption of a "substantial" change in control standard will also address this concern. See discussion at Section I.C.1, supra.

[32]Notice at ¶ 15.

(i) Transactions involving tax certificates issued by the Commission pursuant to section 1071 of the Internal Revenue Code of 1986, as amended;[33]

(ii) Transactions deemed to be "tax free" exchanges of assets under section 1031 of the Code; and

(iii) Transactions deemed to be "tax free" reorganizations under section 368 of the Code.

With respect to tax certificates granted by the Commission pursuant to section 1071 of the Code, the Commission's existing holding period policy for the minority investor should, for the public policy reasons precipitating such certificates, prevail over the three year holding requirement in Section 617(a). This will allow the "controlling" minority investor to sell its interest in less than three years.[34]

The Commission seeks comments regarding whether the payment of cash or other taxable consideration in an exchange of assets

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[33]26 U.S.C. § 1, et. seq. (the "Code").

[34]There is no minimum holding period presently applicable to the sale of a cable television system acquired pursuant to a section 1071 minority tax certificate. The Commission has extended the one year holding period applicable to the sale of broadcast entities to licenses obtained pursuant to its minority tax certificate policy. The Commission has indicated that strict application of that one year holding period could work against the objective of increasing minority participation in broadcasting by precluding certain sales of broadcast facilities to qualifying minority investors. Therefore, even that one year holding period is not applicable to any applicant whose proposed transaction involves an assignment or transfer from one minority owned or controlled entity to another (i.e., any proposed resale by the minority transferee in an initial transaction is not subject to the one year holding period if the resale will also be exempt). In the Matter of Amendment of Section 73.3597 of the Commission's Rules (Applications for Voluntary Assignments or Transfer of Control), 99 FCC 2d 971, ¶¶ 8-10 (1986).

under section 1031 of the Code should render such a transaction ineligible for this exception.[35] Because exchange transactions under section 1031 of the Code ordinarily include some taxable consideration in order to equalize the respective values of the two sets of assets being exchanged, a rule that makes ineligible for the Section 617(c)(1) exception any section 1031 transaction that includes the payment of taxable consideration would, in effect, make ineligible almost all section 1031 transactions. Accordingly, Time Warner recommends that an exchange transaction under section 1031 of the Code that includes "taxable" property or money should be deemed to satisfy this first exception if the taxable property or money comprises less than 50% of the total property and money received in such transaction. If this condition is satisfied, then the exchange transaction will have been predominantly tax free.

Time Warner recommends that the Commission also include within the exception for tax free transfers "tax free" contributions to capital under section 351 of the Code. Such transfers also are not subject to current tax liability and are consistent with the objectives of the anti-trafficking provision. Contributions qualifying under section 351 of the Code usually involve cash investments or contributions by third parties in exchange for the issuance of stock by the cable operator. Depending on the terms of such a transaction, the percentage

[35] See Notice at ¶ 15.

ownership interest of the existing controlling owner may be reduced to such an extent that a transfer of control to the new investor may result. Such transactions frequently are necessary in order to finance the construction, expansion and operation of cable systems. Although a transfer of control may occur as a result of such a transaction, the former controlling owner does not sell or otherwise transfer any part of its ownership interest in the cable system and therefore cannot be accused of "profiteering" from any such consequential transfer of control.

(b) Exception for Sales Required by Operation of Law or Governmental Act.

The second exception to the anti-trafficking restriction provided by Section 617(c)(2) excludes "any sale required by operation of any law or any act of any Federal agency, any State or political subdivision thereof, or any franchising authority." The Commission has stated that it believes "this exception was intended primarily to enable franchise authorities or other government entities to require the transfer of a cable system that is in violation of its franchise agreement or that is otherwise providing inadequate service."[36]

Time Warner believes that, although this exception should cover transfers legally mandated by a franchising authority, a narrow reading of this exception that largely would limit it only to transfers mandated by a franchising authority is inconsistent with the clear meaning of the language in Section 617(c)(2) and

[36]Notice at ¶ 16.

is not supported by any legislative history. This second exception must be intended to cover any case in which the cable operator either is required (by court order or other government act or decree) or elects (in order to comply with applicable laws or regulations) to transfer or assign some or all of its ownership interest in a cable system, notwithstanding that it has not yet satisfied the three year holding requirement.

Time Warner believes that such exception should be interpreted broadly to include any kind of transfer or assignment of a cable system that occurs in order to comply with any court order or other act or decree of a government entity or with any other applicable law, rule or policy. Such transfers and assignments should include, but not be limited to, the following kinds of required transfers or assignments:

1. A transfer or assignment required by a franchising authority if the franchise agreement expressly grants the franchising authority the right or power to require a divestiture in the context of the specific facts and circumstances of the particular case.[37]

2. Transfers or assignments pursuant to court order in a bankruptcy proceeding or other types of transfers ordered or otherwise sanctioned by a court to protect or enforce creditors' rights, such as transfers and assignments by bankruptcy trustees or receivers.

[37]The exception under Section 617(c)(2) does not, and should not be interpreted to, provide franchising authorities with the right to force divestiture of a cable system if such right is not expressly set forth in the franchise agreement, or to otherwise diminish a cable operator's rights.

3. Transfers or assignments in the context of divorce proceedings, such as transfers and assignments to implement the division of property between spouses or otherwise to facilitate a property settlement, provided that the transfer or assignment is ordered or sanctioned by a court or is otherwise incident to the divorce.

4. Transfers or assignments in the context of probate proceedings, whether as a result of the laws of succession or to facilitate division of the estate or payment of estate taxes, and other transfers to implement legitimate estate planning purposes, particularly if ordered or otherwise sanctioned by the probate court.

5. Transfers or assignments that are implemented in order to comply with statutes or the rules, regulations or policies of government entities, in any such case whether now in effect or hereafter adopted. In particular, a multiple system operator should be allowed to exercise its business judgment, unfettered by the possible applicability of the three year holding requirement to one or more of its systems, in determining which transfers or assignments it should effect in order for such operator to be in compliance with restrictions in the 1992 Cable Act, including in particular the 1992 Cable Act's MMDS and SMATV cross-ownership restrictions and any rules which may be adopted by the Commission regarding horizontal concentration.

The Commission also has requested commenters to indicate whether sales of municipally operated cable systems were also intended by Congress to be exempt from the anti-trafficking rule pursuant to this second exception.[38] Time Warner believes that transfers of municipally operated cable systems required by court order or the decree or act of a government entity other than the local franchising authority clearly could have been intended to be so exempted because such transfers are truly "involuntary."

[38]<u>See</u> Notice at ¶ 16.

Transfers of municipally operated systems required as a result of action taken by the franchising authority itself (such as pursuant to a privatization effort), however, are not truly "involuntary" transfers and are substantially similar to "voluntary" transfers of privately owned cable systems. To the extent that potential abuses are present in voluntary transfers of private cable systems, such potential is equally present in voluntary transfers of municipally operated cable systems. "Voluntary" transfers of municipally operated systems, therefore, should not be included in this second exception.

Time Warner also is concerned about municipalities that overbuild privately owned cable systems and then, lacking the political will or financial ability to develop or exploit the overbuild, decide to sell the system on sweetheart terms in a continuing effort to undermine the overbuilt cable system operator. In such context, exempting the "voluntary" transfer of a municipally operated cable system that is an overbuild would perpetuate the unlevel playing field created by the municipal overbuild.

(c) Exception for Transfers to Affiliates.

The third exception in Section 617(c)(3) provides that the anti-trafficking restriction will not apply to "any sale, assignment, or transfer, to one or more purchasers, assignees, or transferees, controlled by, controlling, or under common control with, the seller, assignor, or transferor." Time Warner concurs with the Commission's belief that this third exception "was intended to apply to pro forma transfers as defined in Section 73.3540(f) of [the Commission's] Rules."[39] Such an approach is consistent with Time Warner's recommendation that the Commission refer to the broadcast transfer of control standards implemented pursuant to Section 310(d) of the Communications Act of 1934 to determine whether a "transfer of ownership in a cable system" has occurred.[40] Indeed, by adoption of such standards, a transaction that results only in a pro forma transfer of control such as a transfer to an affiliate would, by definition, be excluded from the coverage of the anti-trafficking restriction.

Time Warner submits that any attempt to list all possible types of affiliate transfers would be incomplete. Accordingly, Time Warner recommends that the Commission apply the standards developed under Section 73.3540(f) of the Commission's Rules to determine when a transfer is a pro forma transfer and therefore should be excluded as a transfer to an affiliate.[41] Time Warner also concurs with the Commission's tentative conclusion that affiliate and other pro forma transfers included within this exception should not require a new three year holding requirement

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[39]Notice at ¶ 17.

[40]See Section I.C.1, supra.

[41]Specific examples would include, in addition to those described elsewhere in these comments, (i) transfers by ATC and Warner Cable to Time Warner of systems that had been owned by either of them for less than three years; and (ii) transfers of systems held less than three years by a transferor to existing or newly created joint ventures at least 50% owned and managed by that transferor.

to commence following such a transfer. The effective commencement date for application of the three year holding requirement in such cases should relate back to the original date the cable system was constructed or acquired by the affiliated transferor. Such an approach would be consistent with the objectives of the anti-trafficking provision and would permit a cable system operator to alter its internal ownership structure without concern about possibly changing the commencement date of its three year holding period.

2. Satisfaction of specified information requirements under the three exceptions should create a presumption that a transaction is exempt.

The Commission has requested commenters to indicate what types of information should be required to be submitted in order to establish that a proposed transfer or assignment of a cable system satisfies one of the three stated exceptions to the anti-trafficking restriction.[42] Time Warner believes that the types of information and documentation described below would be sufficient to establish availability of an exception without imposing unnecessarily onerous requirements on the cable system operator or its successor. Such documentation generally should

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[42]See Notice at ¶ 18. Time Warner believes that no certification process with either the Commission or the franchising authority should be required under Section 617(a) through (c). See discussion at Sections I.G.2 and 3, *infra*. Irrespective of the procedures finally adopted by the Commission, Time Warner believes that the information requirements that it proposes herein should be sufficient and presumptively determinative in any application, certification or dispute resolution process, or in connection with any request for a declarative ruling from the Commission.

be already in existence given the complex nature of the transactions contemplated by the exceptions. Such requirements also would eliminate the need for the Commission to make an independent investigation of (i) the facts that are posited to support eligibility under an exception, (ii) the applicability of the involved court orders or other acts or decrees of government entities or of the specified laws, regulations or policies, or (iii) the jurisdiction or authority of the involved courts or other government entities with respect to the cable system operator or the particular transfer or assignment.

(a) Information Supporting Eligibility Under the Tax Free Transfer Exception.

Time Warner believes that the parties to a transaction that is intended to be "tax free" will be advised by tax professionals in structuring such transaction and notes that a customary closing condition for such a transaction is the receipt or delivery by one of the parties of written confirmation from such tax professional or, in some cases, a favorable ruling by the Internal Revenue Service (the "IRS"), confirming that it is more likely than not that such transaction should receive the intended tax free treatment. Accordingly, Time Warner believes the submission of the opinion letter or memorandum prepared by a party's tax advisor (other than such that may be protected by attorney-client privilege), or of any IRS ruling referencing the subject transaction, that is delivered or used by a party to satisfy such a closing condition also should presumptively establish that the transaction satisfies the exception for tax free transfers.

Time Warner also notes that the IRS has developed rules, and the IRS and the courts have provided substantial precedent, for determining when certain transactions will be treated as predominantly tax free. If competent tax professionals have advised a party to a transaction that such IRS rules and legal precedent are satisfied in a transaction intended to be treated as a predominantly tax free transaction, then such transaction should be deemed also to satisfy the first exception to the anti-trafficking restriction even if a portion of the consideration included in such transaction may be taxable. Reference to such IRS rules and the body of law developed in their interpretation and application should provide the necessary guidance to the parties in a transaction that is intended to satisfy such exception when determining whether such exception applies to such transaction.

(b) Information Supporting Eligibility Under the Involuntary Transfer Exception.

Time Warner believes that the information that should presumptively establish that a proposed transfer satisfies the second exception concerning involuntary transfers would include the court order or documentation of the act or decree of the government entity or other evidence of the applicability of the particular law, act or decree or government rule or policy that is requiring the particular transfer. If the specific cable system is not mentioned by name in such order, act, decree or other evidence, then a sufficient alternative would be a letter from the transferor's counsel to the effect that it is reasonable to conclude that either (i) such transfer is required by operation of the particular order, decree, act or law, or (ii) as a result of consummating the particular transfer (or a series of transactions of which such transaction is a part), the transferor reasonably believes that it will be in compliance with the specified law, rule or policy.

(c) Information Supporting Eligibility Under the Affiliate Transfer Exception.

Time Warner believes that the cable system operator is best able to determine, and if necessary certify, that a proposed transfer satisfies the exception for an affiliate or pro forma transfer. The transfer documentation, any related pro forma transfer applications (e.g., any related Commission filing, including exhibits, regarding CARS license transfers) or a certification by the transferor's counsel would affirmatively evidence a pro forma transfer and should presumptively establish eligibility under the third exception.

F. Waivers

1. Section 617(d) provides the Commission with general waiver authority.

Section 617(d) grants to the Commission the authority to waive the three year requirement if such waiver would be "consistent with the public interest." Section 617(d) also provides, however, that if the franchise agreement requires franchise authority approval of the transfer, then the Commission may not waive such requirement unless the franchise authority has approved the transfer. Section 617(d) directs the Commission to use such waiver authority in particular to permit appropriate transfers "in the cases of default, foreclosure, or other financial distress." There is no basis from which to conclude, however, that this mandate by Congress was intended to limit the Commission's waiver authority only to transfers involving cases of default, foreclosure or other financial distress, or to cases in which a franchise agreement requires franchise authority approval of transfers. The House Report simply explains:

> [Section 617(d)] empowers the Commission, consistent with the public interest, to waive the requirements of subsection (a), except that, if a franchise requires franchise authority approval of transfers, the Commission shall not waive such requirements unless the franchise [authority] has approved such transfer.[43]

Accordingly, Time Warner believes that Congress intended to grant the Commission general waiver authority and directed the Commission to exercise such general waiver authority particularly, but not only, in cases of default, foreclosure or other financial distress.[44]

Time Warner believes that since Section 617(d) provides general waiver authority, the Commission should grant waivers

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[43]1991 House Report at p. 120.

[44]See WAIT Radio, Inc. v. FCC, 418 F.2d 1153, 1157 (D.C. Cir., 1969) (The Commission must give a "hard look" at proposals, even if they violate literal provisions of a rule, to determine whether strict application of the rule would serve the public interest.).

upon an affirmative showing by the waiver applicant that such a waiver would be "consistent with the public interest" as stated in Section 617(d). In order to assure unfettered access to waivers satisfying this standard, the Commission should not establish limited, specific waiver criteria regarding the types of showings that would be required in connection with general waiver requests that do not involve cases of financial distress.

2. The Commission should identify non-exclusive factors that will establish a *prima facie* case in favor of a waiver in cases involving financial distress.

Time Warner believes the Commission should identify factors, consisting of generic types of factual showings, that will establish a *prima facie* case in favor of a Commission waiver in cases of default, foreclosure or other financial distress. This approach can expedite Commission staff review of requests for a waiver in such cases, and permit waivers to be granted by the staff. Such factors and the Commission's related decisions must clearly establish the availability of waivers in cases of financial distress that are less serious than, or that have not yet deteriorated to the point of, bankruptcy or receivership, which already are covered by the involuntary transfer exception in Section 617(c)(2).[45] Moreover, these factors also should recognize the distinction between and encompass both technical

[45] *See* discussion regarding this exception at Section I.E.1(b), *supra*.

defaults and actions taken by creditors to enforce their rights (e.g., foreclosures by secured parties).

Time Warner also believes that, in addition to such identified factors, any affirmative factual showing of financial distress should be found to satisfy the Commission's waiver criteria. This will ensure every opportunity for a waiver to be granted by the Commission when requested in cases of financial distress, which Congress has expressly determined to be consistent with the public interest.

Specific factual showings that Time Warner believes would establish the existence of default, foreclosure, or other financial distress, and therefore should result in the Commission granting a waiver, include the following:

(i) Submission of documentation entered into by the cable system operator with a lender that expressly requires the operator to liquidate assets or to raise capital in order to remain in compliance with or otherwise satisfy the loan or credit agreement.

(ii) Submission of a letter from a lender that has obtained a security interest in the cable system that the cable system operator is in default under one or more covenants in the loan agreement (as the term "default" may be defined in such documentation) and that in light of such default the lender either (a) technically has the opportunity to foreclose on the cable system or to take an alternative protective step available to it as a secured lender or (b) will be required so to foreclose or to take such an alternative protective step if the cable system operator is unable to sell the cable system or to take other remedial steps that may result in a transfer of the cable system. Such situations should include defaults of either a technical or substantive nature.

(iii) Submission by the cable system operator of a report by its independent auditors which states that one or more matters referenced in such report raise substantial doubt about such company's ability to continue as a going concern. Such a "qualified" audit report is viewed by the accounting profession and by the financial and investing communities as a clear indication that the company is in financial distress.

(iv) Submission of affidavit(s) by the person(s) in control of the cable system which establish that, due to the unavailability of capital, the proposed transfer would be in the public interest.[46]

3. The Commission may grant its waiver prior to, but subject to, any required approval of a transfer by the franchising authority.

Time Warner concurs with the Commission that, in cases where the franchise agreement requires the approval of the franchise authority to any transfer or assignment, the Commission should be permitted to grant waivers prior to the franchise authority's grant of its approval, provided that the effectiveness of any such waiver is expressly conditioned upon any ultimate approval which may be necessary from the franchising authority.[47] This is a common approach in regulatory actions involving transactions subject to the jurisdiction of more than one regulatory authority. Time Warner believes that the Commission should not have to delay action on a waiver request until after the approval of the franchise authority has been granted. Such conditional waivers would become fully effective only upon receipt of any necessary approval from the franchise authority and clearly would

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[46]See 47 C.F.R. § 73.3597(a)(4) of the Commission's Rules, which provides that upon such a factual showing the Commission will grant an exception to its rule requiring a hearing with respect to transfer and assignment applications concerning broadcast stations that have been operated on-air for less than one year.

[47]See Notice at ¶ 20.

not undermine the ability of the franchise authority to withhold such approval when appropriate.

4. Approval by a franchising authority of a transfer within the three year period should create the presumption that the Commission will grant a waiver.

Time Warner also believes that if a proposed transfer or assignment receives the approval of the franchise authority, then a presumption should be created favoring the Commission grant of a waiver.[48] Such a presumption also should arise in cases in which the franchise agreement does not expressly require the approval of the franchise authority to the transfer or assignment of the franchise. Such a presumption is warranted because of the role historically played and proposed to be played by the franchise authority with respect to the transfer or assignment of the franchise.[49]

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[48]This approach is consistent with the policy of the U.S. Department of Justice, announced on April 1, 1985, not to challenge the consolidation of two overbuilt cable systems where the franchising authority has approved such consolidation: "The Department's approach has been that in the typical case where the relevant local government has the authority to deny transfer of a cable television franchise and thereby to prevent consolidation of overbuilt franchises, the Department will generally rely on the municipality's decision and will not bring suit to prevent consolidation unless unusual facts indicate that an exception should be made[...] The local government responsible for a cable franchise decision usually is in the best position to evaluate the preferences of their citizens in the face of these potentially conflicting economic effects."

[49]The Commission tentatively has concluded that the franchise authorities can most efficiently monitor and enforce compliance with the anti-trafficking restriction since local franchising authorities generally are responsible for awarding cable franchises, approving sales and transfers of such franchises and (continued...)

G. Jurisdiction and Enforcement

1. Local franchising authorities were given no authority or responsibility by Congress with respect to the anti-trafficking rules.

In adopting a federal three year holding period, and delegating waiver authority to the Commission, Congress obviously intended a uniform, nationwide standard to be administered and enforced by the Commission. Delegating responsibility to local franchising authorities for enforcement of the federal three year holding requirement would create unnecessary and inappropriate inconsistencies and also could allow franchising authorities to undermine the time limitation for their actions required by Section 617(e). Although franchising authorities are responsible for awarding franchises and approving any transfer or assignment, to the extent an applicable franchise agreement requires approval of an assignment or transfer, all their actions in this regard are the subject of applicable local or state law and the terms of the franchise agreement.[50] Moreover the transfer provisions of cable franchises vary widely, and the three year holding period

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[49](...continued) regulating rates and service. Notice at ¶ 8. These latter responsibilities, however, are either the subject of state and local law and local franchise agreements, or have been expressly assigned by Congress to local authorities which are closest to the citizens directly affected by such decisions. Time Warner, however, believes that the Commission is the only proper authority entitled and able to enforce compliance with Section 617 consistently and uniformly. <u>See</u> discussion at Sections I.G.1 and 2, <u>infra</u>.

[50]This latter point is noted in Section 617(e), which requires a franchising authority to act on any request for such approval within 120 days. <u>See</u> discussion at Section II, <u>infra</u>.

may apply to transactions which do not require local franchise approval and vice versa. Time Warner believes that only the Commission can assure that this federal three year holding requirement is applied in a uniform manner. Accordingly, Time Warner urges the Commission to maintain sole responsibility for interpreting, monitoring and enforcing Section 617.

2. The Commission is the appropriate forum for determining the applicability of the anti-trafficking provisions.

The Commission has primary jurisdiction over the Communications Act of 1934, of which the anti-trafficking rule is a part. Assuring that the federal anti-trafficking provision is applied in a uniform manner must be the Commission's responsibility. Congress did not assign it to others. The Commission alone has the expertise, resources and position necessary to assure that the anti-trafficking provision is applied in a fair and consistent manner throughout the United States,[51] particularly if the Commission adopts the "substantial" transfer of control test proposed by Time Warner.[52] Only the FCC is in the position to apply its own prior precedents reasonably under such a test. If interpretation and enforcement of the anti-trafficking provision is left to local authorities subject to review by local state and federal district courts, disparate

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[51]See, e.g., 47 C.F.R. §§ 73.3597 (Broadcast Anti-trafficking Provisions), 22.40 (Public Mobile Service Anti-trafficking Provisions), and 90.609 (Private Land Mobile Radio Anti-trafficking Provisions) of the Commission's Rules.

[52]See discussion at Section I.C.1, supra.

interpretations and consequences will result. This, in turn, will lead to increased uncertainty and litigation, and to increased costs for both cable operators and franchising authorities. Such costs are likely to be passed through to subscribers through higher taxes, higher rates or both.

Uniform and, to the extent practicable, predictable application by the Commission of the federal three year holding requirement is the only means likely to result in fairness to cable operators. Furthermore, only if the Commission is the <u>sole</u> forum for resolving questions over application of the anti-trafficking provision can a multi-system operator seeking to sell a group of systems avoid the possibility of having to address different interpretations by various local authorities, or appealing adverse or contradictory decisions in multiple jurisdictions. Time Warner believes that by using the time tested procedures set forth in Section 76.7 of the Commission's rules (the special relief rules), the Commission can assure that disputes involving the anti-trafficking rule are resolved quickly, efficiently and uniformly, and consistent with the Commission's policies.

In addition, since Section 617(d) of the Cable Act provides the Commission with broad waiver authority, it is likely that the Commission would be asked to consider granting a waiver when a dispute arose between an operator and a franchising authority as to a particular transaction's compliance with the anti-trafficking rule. Because the Commission's grant of a waiver request would moot any dispute regarding the application of the rules by another authority, any court faced with such a dispute probably would simply defer acting until after the Commission rendered its decision.

3. Rescission of a transaction that violates the three year holding requirement is not necessary.

The Commission has requested comments with respect to what sanctions would be appropriate for transfers in violation of the anti-trafficking rules. Time Warner agrees with the Commission that the anti-trafficking rules do not require the reversal of transfers that are subsequently found to violate the rule. Time Warner also believes that in many cases, a reversal of the transfer would punish the wrong party (i.e., the transferee and not the transferor), and should not be required except in truly egregious situations. Instead, the Commission should handle enforcement in generally the same way it addresses unauthorized transfers of control of CARS licenses.[53]

Time Warner believes that if the Commission adopts the policies and procedures outlined in these comments, the risk of a violation occurring will be minimized. Cable system operators should be allowed to proceed with assignments and transfers that they believe in good faith either satisfy or are exempt from the three year holding requirement. Because the Commission will likely be asked to address any good faith dispute regarding the applicability of the anti-trafficking rule prior to the transfer,

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[53]<u>See</u> 47 C.F.R. § 78.35.

transfers that would violate the rule could be denied if a waiver is unwarranted.[54]

II. LIMITATION ON DURATION OF FRANCHISE AUTHORITY POWER TO DISAPPROVE TRANSFERS

A. 120 days is a reasonable time period for local franchising authorities to act on a transfer application.

A franchise agreement is a contract between a franchising authority and a cable system operator. It is an established premise of contract law that an implied covenant of good faith and fair dealing exists within all contracts.[55] If a franchise agreement requires an operator to seek approval for a transfer of the system or franchise, then the franchising authority has a reciprocal duty to act on the application.[56] The franchising authority must act reasonably in approving or denying the request, and must reach such decision within a reasonable time.[57] Even if the franchise agreement does not contain express words to the foregoing effect or specify a timeframe for action, these

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[54]See discussion at I.E.2, supra.

[55]See, e.g., Orange County Cable Communications Company v. City of San Clemente, 59 Cal. App. 3d 165, 171; 130 Cal. Rptr. 429, 434 (1976); and Preston v. David, No. C-870579, 1988 Ohio App. slip op. LEXIS 3765 at 6. See also Uniform Commercial Code § 1-203 (Obligation of Good Faith).

[56]See Southern Railway Company v. Franklin & P.R. Co., 96 Va. 693, 32 S.E. 485, 486 (1899) (If "the obligation in question. . . be a necessary implication from the provisions of the instrument. . . the law will imply the obligation and enforce it.").

[57]See, e.g., Hawaii Rev. Stat. §§ 440G-7 and 440G-8 (1992); Minn. Stat. § 238.083(2) (1992); W. Va. Code § 5-18-10 (1992); and footnote 62, infra.

standards are implicit or the prior approval requirement would be meaningless.[58]

Section 617(e) provides that "... a franchising authority shall. . . have 120 days to act upon any request for approval of [a] sale or transfer. . ." (Emphasis supplied). This requirement preemptively establishes 120 days as a reasonable period of time within which a franchising authority must act after receiving information "required" to reach a determination. Section 636(c) of the Communications Act of 1934 provides that, with respect to cable system operations, "any provision of law of any state, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded." In carrying out its statutory mandate to promulgate regulations to implement the 1992 Cable Act, the Commission should assure that the mandatory 120 day limitation in Section 617(e) effectively preempts any uncertainty that could excuse inconsistent actions or unreasonable delays by a franchising authority.[59] A franchising authority's discretion, whether expressed in or implied from a franchise agreement or applicable law and no matter when or how effected, to take longer

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[58] See Gloucester Ferry Co. v. Pennsylvania, 114 U.S. 196-203 (1885).

[59] See Report and Order in MM Docket No. 84-1296, 58 RR 2d 1, n. 91 (1985) ("[N]either a cable operator nor a franchising authority may waive mandatory sections of the Cable Act in reaching franchise agreements.").